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Murugan a/l Manoharan v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05–245–08 OF 2014
MOHTARUDIN BAKI, AHMADI ASNAWI AND ABDUL KARIM JJCA
12 OCTOBER 2017

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') — High Court convicted accused and sentenced accused to death — Whether learned trial judge erred in law and fact — Whether there were unexplained great discrepancies between drug exhibits, total drugs recovered and tendered in court — Whether there were any flaws in investigation — Dangerous Drugs Act 1952 s 39B(1)(a)*

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This was an appeal against the conviction and sentence of the High Court. The appellant was convicted on the amended charges of trafficking ketamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and possession of pseudoephedrine under s 9(1) of the Poisons Act 1952. The learned trial judge found that the prosecution had successfully proven its case against the appellant beyond reasonable doubt and the appellant was sentenced to death on the charged of trafficking ketamine and sentenced to 12 months imprisonment on the charge of being in possession of pseudoephedrine under the second charge. In arriving to his decision, the learned trial judge had relied and accepted the evidence of, inter alia, the investigating officer ('PW15') and the chemist ('PW2'). Aggrieved by the conviction and sentence on trafficking charge under s 39B of the DDA, the appellant filed for an appeal. The appellant addressed the court on four main issues: (a) the learned trial judge had erred in law and facts when he failed to realise that the appellant's evidence did cast reasonable doubt; (b) the learned trial judge had failed to consider at all the relevancy reports from Cyber Security Malaysia which could confirm details of telephone numbers of the third parties; (c) the trial judge erred when he found that the character of one Pretam Singh was fictitious, or a creation of the appellant, and commented adversely about the failure to call Pretam Singh and/or mother or wife of the appellant was fatal to the defence case; and (d) there were unexplained great discrepancies between the drug exhibits, the total drugs recovered and tendered in court.

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Held, dismissing the appeal and affirming the decision of the trial judge:

(1) The learned trial judge had rightly made a clear affirmative finding of the possession and knowledge of the impugned drugs based on the evidence

by the prosecution witnesses that he had accepted. After having gone through the entire evidence record, the court was in complete agreement with the learned judge on the affirmative finding of possession. Based on the different versions given when asked about the contents of the bag, the most reasonable inference was that the appellant had knowledge of the drugs in the said bags. In these circumstances, the learned trial judge had rightly arrived in his findings (see para 12).

(2) The learned trial judge had considered the defence in light of the prosecution evidence and had rightly made its findings. The court agreed with the deputy public prosecutor's submission that PW15 had done all required to investigate the existence of Pretam Singh and that the issue had no merit. The court did not find any flaw in PW15's investigation on these issues. He had done what was reasonable in the circumstances and there was clearly no issue of suppression by the prosecution. The appellant was charged with trafficking and it was not an issue whether or not he was the owner of the bags or the impugned drugs. Whether the alleged Pretam Singh existed and that he was the owner of the bags, or the true trafficker was not relevant. What had to be proved had been conclusively found by the trial judge was that the appellant was found in mens rea possession of the impugned drugs. In this regard, learned counsel's argument had no merit (see paras 13 & 17).

(3) Having duly considered both parties' submissions, the court found that the issue raised by learned counsel as to the identity of the drugs was devoid of any merit. No further elaboration was needed on the issue except to say that the first charge was preferred against the accused when he was first charged in court and the charges were later amended after the chemist report had been issued by PW2. This was a common practice in cases involving s 39B of the DDA (see para 20).

(4) There was no merit in learned counsel's argument with regards to the difference in weight and the handling of the impugned drugs. This was because there was no doubt as to the identity of the drugs recovered from the appellant's possession with the drugs that were finally tendered in the court as they were the same. Based on a perusal of the records, the discrepancy was minor in nature and easily explainable. Evidence presented by PW2 had debunked learned counsel's argument that there could be a break in the chain with regard to the identity of the drugs where there was a great difference of 315g (which should have been 312.4g) not accounted for. It should be the net weight and not the gross weight as found by PW2. Learned counsel failed to address himself correctly on the terms used, ie: gross weight, net weight and pure weight of drugs. Therefore, the alleged difference was minor in nature, explainable and did not in any way effect the integrity and identity of the impugned drugs (see paras 21–22).

(5) There was no merit on the issue of mishandling of the impugned drugs. Despite the alleged unaccounted for amount, which was found to be slight and explainable, the impugned drugs were one and the same drugs that were seized from possession from the appellant. There was no reason to disturb the impugned drugs of the learned trial judge. Further the learned trial judge had appreciated the correct law in applying the decision of *Hasbala Mohd Sarong v Public Prosecutor* to the present case (see paras 23–24).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap sabitan dan hukuman Mahkamah Tinggi. Perayu disabitkan atas tuduhan pengedaran dadah ketamine yang dipinda di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan pemilikan pseudoephedrine di bawah s 9(1) Akta Racun 1952. Hakim perbicaraan yang bijaksana mendapati bahawa pihak pendakwaan telah berjaya membuktikan kesnya terhadap perayu melampaui keraguan munasabah dan perayu dijatuhkan hukuman mati atas tuduhan pengedaran ketamine dan dihukum penjara 12 bulan atas tuduhan memiliki pseudoephedrine di bawah tuduhan kedua. Dalam mencapai kepada keputusannya, hakim perbicaraan yang bijaksana bergantung dan menerima keterangan, antara lain, pegawai penyiasatan ('PW15') dan ahli kimia ('PW2'). Tidak puashati dengan sabitan dan hukuman atas tuduhan pengedaran di bawah s 39B ADB, perayu memfailkan rayuan. Perayu mengemukakan empat isu utama kepada mahkamah: (a) hakim perbicaraan yang bijaksana tersilap dari segi undang-undang dan fakta apabila beliau gagal untuk mendapati bahawa keterangan perayu telah melemparkan keraguan munasabah; (b) hakim perbicaraan yang bijaksana telah gagal untuk mempertimbangkan langsung kesemua kerelevanan laporan daripada Cyber Security Malaysia yang mana boleh mengesahkan butir-butir telefon nombor pihak ketiga; (c) hakim perbicaraan tersilap apabila beliau mendapati bahawa watak seorang yang bernama Pretam Singh adalah rekaan, atau ciptaan perayu, dan membuat komen secara membidas mengenai kegagalan untuk memanggil Pretam Singh dan/atau ibu atau isteri perayu adalah serius kepada kes pembelaan; dan (d) terdapat percanggahan yang tidak dapat dijelaskan di antara dadah yang diekshibitkan, jumlah keseluruhan dadah yang ditemui dan yang diserahkan kepada mahkamah.

Diputuskan, menolak rayuan dan mengesahkan keputusan hakim perbicaraan:

(1) Hakim perbicaraan yang bijaksana telah membuat dapatan afirmatif yang jelas terhadap milikan dan pengetahuan mengenai dadah yang dipersoalkan tersebut berdasarkan keterangan oleh saksi pendakwaan yang diterimanya. Selepas meneliti keseluruhan rekod keteragan, mahkamah bersetuju sepenuhnya dengan hakim yang bijaksana ke atas

dapatan afirmatif milikan. Berdasarkan atas versi berlainan yang diberikan apabila ditanya mengenai kandungan beg, inferens yang paling munasabah adalah bahawa perayu mempunyai pengetahuan mengenai dadah di dalam beg tersebut. Dalam keadaan, hakim perbicaraan yang bijaksana telah mencapai dapatannya dengan betul (lihat perenggan 12).

(2) Hakim perbicaraan yang bijaksana telah mempertimbangkan pembelaan berdasarkan keterangan pihak pendakwaan dan telah membuat dapatannya dengan betul. Mahkamah bersetuju dengan hujahan timbalan pendakwa raya bahawa PW15 telah membuat kesemua yang dikehendaki untuk menyiasat kewujudan Pretam Singh dan isu tersebut tidak mempunyai merit. Mahkamah tidak mendapati apa-apa kecacatan di dalam penyiasatan PW15 atas isu-isu ini. Beliau telah melakukan apa yang munasabah dalam keadaan dan jelas tidak terdapat isu terhadap penindasan oleh pihak pendakwaan. Perayu dituduh dengan mengedar dan ia bukan isu sama ada atau tidak dia adalah pemilik beg tersebut atau dadah yang dipersoalkan. Sama ada dakwaan bahawa Pretam Singh wujud dan dia adalah pemilik beg tersebut, atau pengedar sebenar adalah tidak relevan. Apa yang perlu dibuktikan telah didapati secara konslusif oleh hakim perbicaraan adalah bahawa perayu didapati dalam milikan mens rea terhadap dadah yang dipersoalkan tersebut. Berkaitan ini, hujahan peguam yang bijaksana tidak bermerit (lihat perenggan 13 & 17).

(3) Setelah mempertimbangkan penghujahan kedua-dua pihak, mahkamah mendapati bahawa isu yang dibangkitkan oleh peguam yang bijaksana terhadap identiti dadah tersebut adalah tanpa apa-apa merit. Tiada penjelasan lanjut diperlukan atas isu kecuali untuk menyatakan bahawa tuduhan pertama adalah dikenakan terhadap tertuduh apabila dia dituduh pertama kalinya di mahkamah dan tuduhan-tuduhan kemudiannya dipinda selepas laporan ahli kimia telah dikeluarkan oleh PW2. Ini adalah amalan biasa dalam kes-kes yang melibatkan s 39B ADB (lihat perenggan 20).

(4) Tidak terdapat merit dalam hujahan peguam yang bijaksana berkaitan perbezaan dalam berat dan pengurusan terhadap dadah yang dipersoalkan. Ini adalah kerana tidak terdapat keraguan terhadap identiti dadah yang ditemui dariapda milikan perayu dengan dadah yang akhirnya diserahkan di mahkamah kerana ia adalah yang sama. Berdasarkan ke atas penelitian rekod-rekod, percanggahan adalah bersifat kecil dan senang dijelaskan. Keterangan yang dikemukakan oleh PW2 telah memaparkan kepalsuan hujahan peguam yang bijaksana bahawa mungkin terdapat penyimpangan dalam rantaian berkaitan identiti dadah di mana terdapat perbezaan jelas terhadap 315g (yang mana sepatutnya adalah 312.4g) yang tidak diambil kira. Ia sepatutnya adalah berat bersih dan bukan berat kasar seperti yang didapati oleh

PW2. Peguam yang bijaksana gagal untuk menangani dirinya secara betul atas terma-terma yang digunakan, iaitu: berat kasar, berat bersih dan berat tulen dadah tersebut. Oleh itu, dakwaan perbezaan adalah bersifat kecil, boleh dijelaskan dan tidak dalam apa-apa cara menjejaskan integriti dan identiti terhadap dadah tersebut (lihat perenggan 21–22).

(5) Tidak terdapat merit atas isu salah pengurusan dadah yang dipersoalkan tersebut. Meskipun dakwaan jumlah yang tidak diambil kira, yang mana didapati adalah kecil dan boleh dijelaskan, dadah yang dipersoalkan adalah satu dan dadah yang sama yang dirampas daripada milikan daripada perayu. Tidak terdapat alasan untuk menggangu dapatan hakim yang bijaksana ke atas dadah yang dipersoalkan tersebut. Selanjutnya hakim perbicaraan yang bijaksana telah menilai undang-undang yang betul dalam mengunapakai *Hasbala Mohd Sarong v Public Prosecutor* kepada kes ini (lihat perenggan 23–24).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 321–500.

Cases referred to

Emeka Promise v PP [2016] 3 MLJ 757; [2015] 3 CLJ 916, CA (not folld)
Hasbala Mohd Sarong v PP [2013] 6 CLJ 945; [2013] 6 MLJ 636, FC (refd)
Rahmani Ali Mohamaad v PP (Criminal Appeal No 05–193 of 2013) (unreported), FC (not folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 39B

S Sundarajan (Sundarajan & Assoc) for the appellant.
Jasmee Hameeza bt Jaafar (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Karim JCA:

INTRODUCTION

[1] Murugan a/l Manoharan, the appellant before us, was placed on trial before the High Court at Tawau, Sabah to answer the following two amended charges:

First Amended Charge

Bahawa kamu pada 25 Mac 2013 jam lebih kurang 2.35 petang di Pejabat Bahagian Perkastaman, Cawangan Pemeriksaan Penumpang (CPP) Jabatan Kastam Diraja Malaysia, Balai Ketibaan Lapangan Terbang Tawau, dalam Negeri Sabah telah didapati mengedar dadah berbahaya iaitu Ketamin seberat

8,137.5 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) ADB 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

Second Amended Charge

Bahawa kamu pada 25 Mac 2013 jam lebih kurang 2.35 petang di Pejabat Bahagian Perkastaman, Cawangan Pemeriksaan Penumpang (CPP) Jabatan Kastam Diraja Malaysia, Balai Ketibaan Lapangan Terbang Tawau, dalam Negeri Sabah telah didapati memiliki Pseudoephedrine seberat 2,962.3 gram yang disenaraikan dalam jadual pertama Akta Racun 1952 dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 9(1) Akta Racun 1952 yang boleh dihukum di bawah seksyen 32(2) Akta yang sama.

[2] The trial ended in his conviction for both charges. He was sentenced to death on the charge of trafficking of ketamine under the first amended charge, and was sentenced to 12 months imprisonment on the charge of being in possession of pseudoephedrine under the second amended charge.

[3] Aggrieved by the conviction and sentence on the trafficking charge under s 39B of the Dangerous Drugs Act 1952 ('the DDA 1952'), the appellant preferred an appeal to this court. We dismissed the appeal after due consideration of the facts and issues raised. We now give our grounds for deciding as we did.

THE PROSECUTION'S CASE

[4] The case of the prosecution was well laid out by the learned trial judge in his grounds of judgment which we reproduce below:

On 25th day of March 2013 PW6, a custom officer was on duty at the arrival hall Tawau Airport, Tawau Sabah. At about 2.30pm there was flight arriving from Kuala Lumpur. After the Immigration clearance PW1 saw an Indian man carrying a sling bag and a teddy bear took a trolley and proceeded to the conveyor belt. The Indian man was later identified as the accused.

From the conveyor belt the accused collected two bags, one blue in colour and the other one black wrapped with plastic wrapper and put them on the trolley. The acussed then pushed the trolley and before he went out PW6 directed him to place the bags into the scanning machine for inspection. PW10, another custom officer, scanned the two bags and noticed an unusual images therein. The acussed told PW10 that the contents of the bag is meant for sale in Tawau. PW10 then alerted PW7 who directed the acussed to open the bags. The acussed then cut the plastic wrapper on one of the bags. Upon realising the bag was locked, PW7 asked the acussed about the key to which the acussed replied that he did not have them and said that the bag belong to his uncle and was sent through him. The acussed was then directed to open the bag using a scissors and he managed to do so. He took out one package containing women accessories. PW7 then referred the acussed to

PW12 for the assessment of tax. PW12 conducted a check on the bag at the Cawangan Pemeriksaan Kastam (the said room), acussed was directed to open the bag.

After the contents of the said bag were taken out PW12 checked the empty small blue bag and sensed that something are hidden in the bag. He then took the bag for another scanning process leaving the acussed together with PW7 in the said room. When the bag was scanned PW12 saw an image of something hidden inside the bag. He returned to the said room together with the said bag and call PW9 to assist. PW9 checked the bag and observed that something was hidden in the inner layer of the said bag and found white substance in it. At this stage PW9 was asked by PW12 to cease checking until the arrival of custom officer from the Enforcement Unit. At about 4.15pm PW14 arrived at the said room and checked the said bag (P24) and conducted initial test on its content using a test kit. The initial test revealed that the white substance was ketamine. PW14 conducted further check on another bag-one big blue bag (P25) and from the inner front part of the bag and found to be ketamine. At this stage PW14 received a call from PW8 directing him not to continue with the checking until the arrival of the custom officer from the Narcotic Section Kota Kinabalu, Sabah. The team arrived at about 8.15pm and further similar check was conducted on one big blue bag (P25) and one big black bag (P26).

From the checking the custom officer seized 24 packet of drugs weighing 14,106g. The acussed was then put under arrest and brought to the Custom's Enforcement Unit's office in Tawau together with the drugs. The drugs were sent to Jabatan Kimia Kota Kinabalu for analysis and it was confirmed by PW2 (the chemist) that the contents of the 24 packages were ketamine and pseudoephedrine the subject matter of the charge.

FINDINGS AT THE CLOSE OF THE PROSECUTION'S CASE

[5] At the close of the prosecution's case, the learned trial judge found that the prosecution had successfully proved a prima facie case against the accused. The learned trial judge accepted the evidence of PW2, Biling ak Peter Raig, the chemist, as to the nature and weight of the drugs. The learned trial judge further found that the appellant had actual possession (having custody and control of the said bags) and knowledge of the impugned drugs. Such affirmative finding of mens rea possession was based, among others, on the following facts:

(a) the accused was seen taking and carrying the said bags from the conveyor belt to the trolley;

(b) he was also seen placing the said bags on the trolley before pushing it and walked towards the exit door;

(c) the impugned drugs were found hidden in the secret compartment in the said bags;

(d) the drugs were carefully packed in the packages which were sewn together before it was placed in the secret compartment. These drugs were not

visible to the naked eyes and it was only after custom officer, Ombra @ Omrah bin Sailillah, PW12, had carefully checked one of the bags ('P24') that the drugs were discovered; and

(e) the accused was from India and entered Sabah through immigration check point at the airport via Kuala Lumpur.

[6] As to trafficking, since it involves ketamine, the learned trial judge had, by relying on s 2 of the DDA 1952, further found that the very act of *carrying* the bags containing the large amount of drugs ie ketamine weighing *8,137.5g*, in which the amount are too large for personal consumption, and the manner it was hidden show that the accused was trafficking in the said drugs. The accused was thus called to enter upon his defence on both the charges.

THE DEFENCE

[7] The appellant gave evidence on oath. The learned trial judge had aptly summarised it as follows:

> He testified that he came to know one Pretam Singh in August 2012. He first met Pretam Singh in Butterworth. He then bought some furniture on credit from Pretam Singh. He claim that both his mother and wife had seen Pretam Singh delivering the furniture to his house. After paying two installment the accused could not afford to pay Pretam Singh and he ended obtaining a loan of RM1,500 (sic) Pretam Singh payable on monthly basis with an interest of 20% per month. He then worked with Pretam Singh. One day, Pretam Singh told the accused that he wanted to send the accused to India to collect some jewellary and ladies accessories and to bring them to Tawau.
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> The accused further testified that a person by the name of Nathan gave him the flight ticket to India and 10,000 India rupee. He left for India sometimes in March 2013 and was met by Pretam Singh at the airport. He spent one week in India and during that time he stayed in a hotel. Pretam Singh then gave him two bags which were locked and wrapped in a plastic wrapper. The keys were kept by Pretam Singh. He was given a receipt (P34) by Pretam Singh and was informed that the contents of the two keys are as per the receipt. He was instructed to call someone upon his arrival in Tawau.
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> The accused claimed that he did not know that there were drugs in the bag.

FINDING AT THE END OF THE DEFENCE CASE

[8] The learned trial judge found that the appellant's defence was a mere denial and, as a whole, had also failed to raise a reasonable doubt on the prosecution's case. The prosecution thus had successfully proven its case against the accused beyond reasonable doubt. In the result the appellant was found guilty and sentenced to death by hanging.

A THE INSTANT APPEAL

[9] At the hearing of the appeal, learned counsel for the appellant addressed the court on four main issues namely:

B (a) the learned trial judge had erred in law and facts when he failed to realise that the appellant's evidence did cast reasonable doubts;

(b) the learned trial judge had failed to consider at all the relevancy of the report from Cyber Security Malaysia which can confirm the details of telephone numbers of the third parties;

C

(c) the trial judge had erred when he found that the character of one Pretam Singh was fictitious, or a creation of the appellant, and commented adversely about the failure to call Pretam Singh and/or mother or wife of the appellant being fatal to defence case; and

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(d) there are unexplained great discrepancies between the drug exhibits, the total drugs recovered and tendered in court.

[10] On issue (a), learned counsel argued that the appellant had already E raised his defence at the first available opportunity during the prosecution's case when the investigating officer, Fardly Harris Salleh ('PW15') was giving his evidence. In addition, the evidence given by the appellant was consistent with the questions posed by defence counsel during the cross-examination of the PW15. The appellant in his evidence stated that he had been deceived by F Pretam Singh from the beginning (offered and bought electrical items and furniture) to the end (he was stuck in the situation that he had to pay back installment with interest of 20% per month). At the end, he agreed to repay the money he borrowed by working with Pretam Singh. He denied that he had any knowledge about the drugs which had been sealed in the secret compartment of G the bags as he did not have the key, the bags were locked, and the bags were already wrapped when it was given by Pretam to him to carry it from India to Tawau. It was stressed upon us that the learned trial judge had misdirected himself when he had failed to compare or give weight to the evidence of the appellant and totally rejecting the version as being an afterthought and not H casting any doubt.

[11] The prosecution on the other hand argued that the appellant had possession and knowledge of the drugs. Mohd Khairy bin Amat ('PW6'), testified that the appellant was only carrying a sling bag ('P27') and a teddy bear I ('P28'). The appellant went to Conveyor A and took two baggage ('P25') and ('P26') from the conveyor belt and placed the two baggage on a trolley and proceeded to carry them to the exit door before he was stopped by PW6.The appellant's baggage were scanned by Suhaina bt Hussin ('PW10'), and upon scanning, PW10 found incriminating image. PW10 informed Norasmah bt

Gani ('PW7'), and later on she asked the appellant to open the P25. After the wrapping on P25 was cut open, and upon seeing that P25 was locked by a padlock, PW7 had asked the accused to open the padlock. When asked about the key, the accused said that P25 along with P26 were his uncle's and his uncle had asked him to deliver the baggage on his behalf. In addition, the baggage tags ('P25A') and ('P26A') clearly show that the baggage were registered under the appellant's name. Therefore, there was no issue of false identity of P25 and P26 belonging to the appellant. Thus, learned DPP submitted that the appellant had custody and control over the said drugs and that the learned trial judge was right in making the affirmative finding of possession with knowledge of the impugned drugs.

[12] In our opinion learned counsel's argument on this issue has no merit. The learned judge had rightly made a clear affirmative finding of possession and knowledge of the impugned drugs based on the evidence by the prosecution witnesses that he had accepted. We have gone through the entire evidence on record and we are in complete agreement with the learned trial judge on the above affirmative finding of possession. It was not disputed that the appellant was carrying the said bags all the way from India to Tawau Sabah via Kuala Lumpur. It was not disputed and if disputed, not successfully challenged, that the bags contained a substantial amount of the impugned drugs. As to knowledge of the drugs, we find that it is impossible that the appellant did not know about the drugs. It must be noted that P25 and P26 were wrapped in plastics and both were locked by padlock, and, in addition, were placed in secret compartments in each bag. The appellant also gave different answers about the content of the bags when asked by two different officers. When he was asked by PW7 he said that he was delivering the bags on behalf of his uncle, while before PW10 he said that the goods inside were meant to be sold in Tawau. From the different versions given, the most reasonable inference is that the appellant had knowledge of the drugs in the said bags. In the circumstances, we find that the learned trial judge had rightly arrived at the following ultimate facts at pp 14–17, AR:

> At this juncture it must be stressed that the said drugs were found in the two big bags P25 and P26 and in another small blue bag P24 found in P25. Both P25 and P26 were locked with a padlock and wrapped with transparent plastic wrapper (P25A and P26A). The drugs were kept in 4 packets made of cloth and sewn together and then place/hid in a secret compartment located in the inner front and back portion of the bags (P24, P25 and P26). Besides that the net weight of Ketamine and Pseudoephedrine of 8,137.5 gram and 2,962.3 gram respectively which is two large of a quantity also fortify my view that he (sic) Accused do have knowledge of the drugs in the said bags.
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> It is perhaps pertinent to note that all the bags were locked with small padlocks but the keys were not with the Accused. In other words the Accused was carrying the locked bags without keeping he keys with him and this could lead to an inference that the Accused do not know the content of the bags. However as can be seen from

A the evidence of PW7 and PW14 that said bags could still be opened even without the keys by poking the zipper with the scissors. Even though it was PW7 who instructed the Accused to open the bag using the scissors the fact remains that the bag could still be opened without using the keys. As such the non production of the keys is not fatal to the issue of knowledge.

B The second point to be noted is the purported owner of the said bags. The Accused initially told PW7 that he was carrying the said bags for his uncle whereas when questioned by PW14 the Accused admitted that the bags belong to him. In my opinion the issue of the owner of the said bags is not relevant because the prosecution is not required to prove ownership of the said bags. The primary C concern of the court is on the issue of possession of the said drug and it is irrelevant for this court to determine the ownership of the said bags at this stage.

The other point to be considered is the fact that the Accused had produced a receipt from Aman Traders (P34) as proof of purchase of the ladies accessories found in the bags. It is proven that among the items seized by the Custom Officers from the bags D were ladies accessories. It is also proven that the Accused did produce the said receipt to the Custom Officers when they proceeded to access the tax payable by the Accused on the imported goods. However it must also be noted that the said drugs were kept hidden in a secret compartment in the inner front and back portion of the bags. Also it was PW12's evidence that when the contents of small blue bag (P24) E was taken out, the bag (P24) was still heavy which led to his suspicion that there are something hidden in it. As it turn out to be further checks done by PW14 shows that there were a total of 16 packets made of cloth sewn together, each packet contained drug.

Hence, it is my considered opinion that the mere fact that the Accused could F adduced the receipt of the purchase of the ladies accessories it not a ground to negate the element of knowledge on the part of the Accused of the presence of the drugs in the bags. To the contrary, the fact that the said drugs were hidden in the secret compartment of the said bag and securely stuffed inside the packets shows that the Accused know that he was also carrying drugs with him. I must also not loose sight of the fact that the 2 bags (P25 and P26) were securely wrapped with plastic G wrapper. Again it must be noted here that the drugs were also found hidden in the inner front and back portion of the two bags (P25 and P26). The very act of wrapping the said bags could be inferred as the Accused's intention of ensuring that the said drugs would not easily be detected during his journey.

H **[13]** Flowing from the above, we also find that the learned trial judge had considered the defence in the light of the prosecution evidence and had rightly made the following finding pp 35–37, AR:

Hence it is my considered opinion that so called Pretam Singh is merely the creation I of the accused in his attempt to cast doubt on the prosecution case. This so called creation is even more obvious when the accused gave different answers as to the owner of the bags when question by the custom officer. He told PW7 that the bags when question by the Custom Officer. He told PW7 that the bags belong to his uncle but when asked by PW14 he admitted that the bags were his. This inconsistencies only shows that the accused was trying to find ways to distance

himself from the offence but this does not cast any doubt in the prosecution's case. **A**

The defense put forward by the Accused is one of the Denial. He denied having knowledge of the presence of the drugs in the said bags. In my opinion, his denial has not cast any doubt in the prosecution's case.

B

[14] Issues (b) and (c) are inter-related. We will elaborate it together. Learned counsel argued that the prosecution team did seize three telephones (exhs P52, A–C), and that the appellant did mention to the prosecution witnesses that the phone numbers of the appellant's boss was recorded in one of the telephones. It was pointed out that this fact was agreed by PW15 in his cross-examination. Learned counsel referred us to the case of *Emeka Promise v Public Prosecutor* [2015] 3 CLJ 916 where the Court of Appeal held that the version given under oath by the appellant was consistent with his evidence and the events that happened during the time the appellant was arrested, and learned counsel contended that the defence had raised reasonable doubts on the prosecution's case and it was the duty of the prosecution to investigate the defence version when the cyber security report stated 'analisa tidak menunjukkan input terguna'. The appellant argued that he had already complied with the '*Alcontara* notice'. **C** **D** **E**

[15] Besides, learned counsel also argued that the trial judge erred when he said the character of one Pretam Singh was fictitious or a creation of the appellant and commented adversely about the failure to call Pretam Singh and/or mother or wife of the appellant was fatal to the defence case. **F**

[16] On behalf of prosecution, learned DPP in her submission argued that PW15 had done all that was required to investigate on the existence of one Pretam Singh based on the report from the cyber security, P 357 (in the CD report). PW15 had also explained it in his evidence that he had taken steps in his investigation to search for the appellant's boss. Thus, it was submitted that this issue had no merit at all and should be rejected. **G**

[17] We agree with the learned DPP submission and in considering these issues, it is germane to refer to pp 250–251, AR, where PW15, upon cross-examination, says as follows: **H**

Q14: I put it to you that if (sic) the hard copy of the CD record was tendered, it would not be favourable to the prosecution?

A: Saya tidak bersetuju sama sekali kerana kandungan hard copy *dan juga cakera padat tersebut adalah sama.* **I**

...

Q: I put it to you that you did not personally investigate to see whether the accused's boss Pretam Singh was in existence or not, but you only rely on the CD report?

A: Saya tidak setuju kerana petunjuk yang ada pada minggu kritikal pertama di mana tertuduh ditahan, pihak kami Cuma mempunyai nombor telefon sahaja yang didakwa oleh tertuduh sebagai bos beliau tetapi seperti apa yang saya nyatakan tadi maklumkan lanjut mengenai (sic) individu terbabit untuk rujukan kepada pihak JPN ataupun pihak Imigresen dan kedutaan negara India tidak ada sama sekali. Nombor telefon 'bos' yang didakwa oleh OKT hanya bertahan dan boleh dihubungi dalam masa beberapa hari sahaja.

We do not find any flaw in PW15's investigation on these issues. He has done what is reasonable in the circumstances and there is clearly no issue of suppression by the prosecution. Even if there is such a short fall in PW15's investigation as alleged by learned counsel, we are of the opinion that it is not fatal so as to create a reasonable doubt to the prosecution case. On the case of *Emeka Promise v Public Prosecutor*, relied by learned counsel to back his above proposition, this court had held that it was important for the prosecution to lead evidence on the hand phones as they could confirm or negate the appellant's version on the existence of one Oba and Moruko and on the defence that the appellant therein had no knowledge of the dangerous drugs as he was merely to deliver the same to Moruko. Upon such failure, this court had acquitted and discharged the appellant in *Emeka Promise*. On appeal by the prosecution, the Federal Court vide Criminal Appeal 05–63–03 of 2015(B), reversed the judgment of this court. Although we did not have the benefit of a written judgment of the Federal Court, we were of the view that *Emeka Promise* could no longer be relied upon. So too in the case of *Rahmani Ali Mohamaad v Public Prosecutor* (Criminal Appeal No 05–193 of 2013) (unreported) where the Federal Court held that such a failure was not fatal to the prosecution case. A fortiori, the appellant was charged for trafficking and it is not an issue that whether he was not the owner of the bags or the impugned drugs in it. Hence, whether the alleged Pretam Singh existed and that he was the owner of the bags, or the true trafficker is not relevant. What had to be proved and had been conclusively found by the trial judge was that the appellant was found in mens rea possession of the impugned drugs. In this regard, learned counsel's argument has no merit.

[18] On issue (d), learned counsel argued that the prosecution had failed to provide any explanation as to the doubt pertaining to the discrepancies in the weight of the drugs exhibits. According to the first charge the drugs exhibit was 14,106g of ketamine, while in the first amended charge the drugs exhibit was 8137.5g of ketamine, and the second amended charge the drug exhibit contained 2962.3g of pseudophedrine. There were serious discrepancies

between the first charge ('D1') and first amended charge ie a difference of 315g, and no explanation was proffered by the prosecution on such difference. Learned counsel suggested that there was actually an earlier chemist report issued before the chemist report dated 16 August 2013 (P8). To add further, the prosecution also did not adduce any evidence to show who was carrying the drug exhibit during the journey from Tawau Airport to the Customs Office at Tawau. This break in the chain of evidence was relevant when there were differences in the weight of the drugs exhibit viz: between the one given by the customs officer and that of the chemist as per his report (P8).

[19] On the other hand, the learned DPP submitted that there was no issue pertaining to the chemist report as the evidence by PW2 had explained that he did not produce any chemist report other than exh P8. Apart from the explanation proffered by PW2, PW15 also had explained about D1 where he stated in his testimony that whenever there was such a case like the present case, he will refer any matter for further instruction or action from the Office of Customs Legal Department in Putrajaya and the Office of the State Legal Advisor of Sabah. Therefore the decision to charge was done by either one of these offices in the present case, and D1 was filed against the accused before the issuing of chemist report P8. PW14 in his testimony further said that the gross weight of the drug exhibits seized was 14,106g. Referring to pp 241–243, AR, PW14, on this issue, said as follows:

Q: I put it to you that there was also at first chemist report that dated before 4.4.2013 which was not served on the accused.

A: Tidak setuju sama sekali.

Q: I put it to you that in the first chemist report the result of the analysis was 14.106kg of ketamine.

A: Tidak setuju sama sekali.

Q: I put it to you that the weight of the Ketamine mentioned in your first charge (D1) was in accordance with the first chemist report.

A: Tidak setuju sama sekali.

Q: Could you charge without chemist report?

A: Apabila berlaku sesuatu kes, kami sebagai Pegawai Penyiasat akan sentiasa rujuk sesuatu perkara untuk mendapatkan sebarang arahan ataupun tindakan lanjut daripada pihak pejabat pengarah perundangan Jabatan Kastam Diraja Malaysia, Putrajaya dan juga pejabat peguam Kanan Persekutuan Negeri Sabah. Oleh (sic) yang demikian, keputusan sama ada sesuatu kes itu dipertuduhkan ataupun tidak adalah keputusan yang dibuat daripada kedua-dua pejabat ini. Dan dalam kes ini, pertuduhan tanpa adanya laporan analisa kimia telah dipersetujui oleh kedua-dua pejabat ini.

[20] We had duly considered both parties' submissions and we found that the issue raised by learned counsel as to the identity of the drugs is devoid of any merit. We noted that learned counsel primary basis in raising this issue revolves entirely on the alleged differences in the weight of the impugned drugs in the first charge and in the first and second amended charges. First and foremost it startled us when learned counsel argued that there was such a possibility of there being an earlier chemist report before the chemist report P8 was issued. Learned counsel vehemently stressed that there were great differences as to the weight of the impugned drugs stated in the first charge with the weight stated in the first and second amended charges. To us, no further elaboration needed on this issue except to say that the first charge was preferred against the accused when he was first (initially) charged in court (in the magistrate court) and the charges were later amended after the chemist report (P8) had been issued by PW2. This is the common practice in cases involving s 39B of the DDA 1952. It startled us even more when learned counsel suggested to PW15 that there was no direction from any higher authorities to prefer such initial charge against the appellant without there being a chemist report. PW15, the investigation officer, explained in such clarity that the charging of the appellant before the issuance of the chemist report was a common procedure, and furthermore, the appellant was charged upon the direction of the public prosecutor. We believe that learned counsel is very much confused here because that first charge (D1) was signed by a deputy public prosecutor, the concerned authority. In addition, PW2 categorically said that he had never issued any earlier report, other than P8, on the impugned drugs. The weight stated in the first charge was, as found and accepted by the trial judge which we undoubtedly agree, weighed by PW14 as being the gross weight of the impugned drugs. In this regard, we do not see any reason to disbelieve PW2. In the above scenario, we fail to see any merit in the proposition raised on the above issue and we agree with the finding of the learned trial judge that such proposition was merely a speculation. To us, this finding is enough to reject this issue in limine.

[21] In any event, as to the difference in weight and the handling of the impugned drugs, we see no merit in learned counsel's argument as well because there is no doubt as to the identity of the drugs recovered from the appellant's possession with the drugs that were finally tendered in court. They were the same. Upon perusing the records, we find that the discrepancy is indeed minor in nature and easily explainable. It is to be noted that the impugned drugs were initially weighed by PW14 in the office using the office uncalibrated weighing machine. The gross weight was 14,106g *including the packages, all in*. Again, this is a common practice pending the accurate weighing by the chemist. The chemist, PW2, however, has his own procedure in weighing the drugs. In his evidence he had explained and differentiated the three terms used viz: gross

weight (*berat kasar*), net weight (*berat bersih*) and pure weight of the drugs (*berat tulen*). PW2 in his evidence, among others, explained the terms as follows:

> Q: Boleh kamu terangkan (sic) bagaimana kamu mendapat jumlah berat bersih bungkusan-bungkusan yang telah kamu timbang?
>
> A: Untuk mendapatkan berat bersih, terlebih dahulu saya mendapatkan berat kasar kandungan bahan bersama-sama dengan bungkusan-bungkusan kain dan daripada perbezaan berat kasar dan berat bungkusan kain kosong yang telah dikeluarkan isi kandungannya maka saya mendapatkan berat bersih, Kaedah ini adalah diguna pakai untuk kesemua barang kes di dalam kotak bertanda L, M dan N. (p 53, appeal record).

On net weight of the drugs (*berat tulen*) and upon being asked by the trial judge during his re-examination (p 73, AR), PW2 further explained as follows:

> Court: Tadi kamu kata berat tulen. Apa perbezaan di antara berat tulen, berat kasar dan berat bersih?
>
> A: Berat bersih adalah perbezaan berat, berat kasar dan berat bungkusan kain kosong. Berat kasar adalah jumlah bungkusan kain termasuk kandungannya. Berat tulen diperolehi dengan (sic) menjalankan ujian kuantitatif menggunakan GCFID.
>
> Dalam Laporan Kimia merujuk kepada L(a) berat bersih ialah 2509.6 gram dan berat tulen Ketamin adalah 1952.7 gram.

[22] The above evidence debunks learned counsel's argument that there could be a break in the chain with regard to the identity of the drugs when there is a great difference of 315g (it should be 312.4g) not accounted for viz: the difference between 14,106g (first charge) and *gross weight* of 13,791g. We find that it should be a *net weight* of 13,793.6g as found by PW2 (not gross weight) as per p 25, AR. These differences can be further tabulated as follows:

Drugs marked as	Net Weight	Pure Weight
P9 (A2(i)-A2(iv))	2,509.6 gms	1952.7 gms ketamine
P10 (A3(i) – A3(iv))	2,464.0 gms	1856.6 gms ketamine
P13 (C2(i)-C2(iv))	2,962.3 gms	2962.3 gms pseudoepherine
P14 (C3 (i)-C3(iv))	3,022.5 gms	2098.8 gms ketamine
P17 (E2(i)-E2(iv))	1330.3.gms	1043.1 gms ketamine
P18	1,504.9 gms	1186.3 gms ketamine

Drugs marked as (E3(i)-E3(iv))	Net Weight	Pure Weight
	13,793.6 gms	**11,099.8 gms**

As we see it, learned counsel fails to address himself correctly on the three terms alluded above. What had been weighed by PW 14 is the gross weight of the impugned drugs with its packages, whereas the net weight (*berat bersih*) as found by PW2 had excluded the packages, which formed part of the gross weight (*berat kasar*). It should be noted that nowhere in his evidence had PW2 provided the details of the gross weight *(berat kasar)* of the exhs P9, P10, P13, P14, P17 and P18 albeit done by PW2. Neither was this aspect of the issue cross-examined by learned counsel. In the circumstances, the only reasonable inference that can be drawn is that the unaccounted 312.4g as alleged must refer to the weight of the packages which PW2 had clearly excluded in finding the net weight (*berat bersih)* of the impugned drugs. We therefore find that the alleged difference is minor in nature, explainable and does not in any way effect the integrity and identity of the impugned drugs.

[23] In addition, we also find that there is no merit on the issue of mishandling of the impugned drugs. Despite the alleged unaccounted for amount, which we had found to be slight and explainable, we find that the impugned drugs were one and the same drugs that were seized from the possession of the appellant. We do not see any reason to disturb the factual finding on the integrity and identity of the impugned drugs of the learned judge. The learned trial judge had rightly considered these issues in his judgment at pp 21–22, AR, as follows:

> PW14 then weigh the drug using the weighing scale brought by the officers from Kota Kinabalu and total weight was 14.106 gram. The Accused and the drugs were taken to the Enforcement Unit office Tawau where a complete marking process on the exhibits was done. Subsequently the Accused was put in the lock-up until 26th day of March 2013 when the PW15, the Investigation Officer took over the case from PW14. Between 25th day of March 2013 and 26th day of March 2013, the exhibits were under the custody of PW14.
>
> On 26th day of March 2013, PW15 took over the case from PW14 where pursuant to a handing over note (P38) the drugs were handed over to him. The drugs were then place in 3 boxes (P4, P5, and P6). On 27th day of March 2013 the boxes were taken to Kota Kinabalu. Each boxes were under the custody of PW8, PW13, and another Custom Officer Richard Martin throughout the journey. They took a flight to Kota Kinabalu and upon arrival at the Narcotic Section of the Custom Department Kota Kinabalu the 3 boxes were kept in a locked steel cabinet in PW15's office.

The said drugs were then taken out for a press conference on 28th day of March 2013. The drugs were under the close supervision of PW8, PW13, PW15 and Richard Martin. After the press conference the drugs were put/placed into the 3 boxes and sealed with the Customs Department's seal before being sent to PW1 the Scientific Officer at Jabatan Kimia Malaysia, Kota Kinabalu.

PW1 then issued an acknowledgement receipt of the said drugs (P3) and kept them in a locked steel cabinet in the strong room. On 1st day of April 2013 PW1 took out the boxes and handed them over to PW2 for analysis. PW2 then kept the boxes in a locked steel cabinet in the strong room after affixing the Chemistry Department's laboratory number onto the boxes.

I pause here to observed the evidence of PW7, PW9, PW12 regarding the examination of one of the bags (P24) and the event that took place thereafter while inside the CPP's office. PW12 inspected P24 after its content have been taken out. Upon sensing that something was hidden in the inner front portion of the bag, PW12 took the bag out of the CPP's office, went to the scanning machine and carried out the second scanning on P24. Upon realizing that there was an image of hidden object, PW12 brought P24 back to the CPP's office accompanied by PW9. Back in the CPP's Office PW9 then conducted another inspection by making a cut on the inner front portion of P24 and found a white substance inside it.

It must be noted that PW12 took P24 out of the room leaving the Accused and PW7 in the CP's office. P24 was at that particular point of time was in the custody of PW12. One question that came to my mind was whether there was any opportunity on the part of PW12 or PW9 to plant the said drug in P24? This was not challenged by the defense. However taking into consideration that PW12 came back to the CPP's office immediately after the second scanning process, it is not possible for him to plant the drug inside P24. Looking at the condition of the drugs hidden in P24 it is not unreasonable to infer that it would require some time for anyone to keep the drug and reseal the inner layer of P24 into its previous condition. It is common knowledge that the scanning machine was located in the arrival hall which can be seen by people making it is quite impossible for PW12 or PW9 to have planted the said drug into P24. Hence, I am of the opinion that the integrity of the said drug were intact.

[24] In further addition, we also find that the learned trial judge has appreciated correct law in applying the decision in the Federal Court case of *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636; [2013] 6 CLJ 945 to the present case. We find no flaw in his following findings (p 29, AR):

In the instant case notwithstanding the said discrepancy there are couple evidence on the proper handling of the drug from the time it was seized to the time it was handed over to PW2 for analysis. The identity of the drugs has been verified by PW9, PW12 and PW14 as well as PW2 resulting in his chemist report. Further the labeling of the said exhibits were sufficiently explained by PW8. PW15 had also testified on the movement of the exhibit from Tawau to Kota Kinabalu. On top of that proper handing over of the drug to PW15 was shown in the handing over note (P38). All these evidence taken in its totality have dismissed any doubt of the possible break in the chain of evidence. In my opinion there is no possibility of any

A mix up in the handling of the said drug especially when PW2 had assigned a specific reference number to the boxes containing drug (P4, P5 and P6) after receiving them from PW15.

CONCLUSION

B

[25] On a consideration of all the materials on record we have no hesitation to affirm the decision of the trial judge and dismiss this appeal.

Appeal dismissed and decision of the trial judge affirmed.

C

Reported by Nisha Paran

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